

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

RAMIRO DEL ANGEL §
v. § CIVIL ACTION NO. 6:08cv322
UNITED STATES OF AMERICA §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Petitioner Ramiro Del Angel, proceeding *pro se*, filed this application for the writ of habeas corpus purportedly under 28 U.S.C. §2241 complaining of the legality of his confinement. This Court ordered that the petition be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Del Angel was charged with possession with intent to distribute and distribution of methamphetamine, receiving a sentence of 151 months in prison. He did not take a direct appeal, but sought relief through a motion to vacate or correct sentence under 28 U.S.C. §2255. This motion was dismissed with prejudice on January 13, 2006, and Del Angel did not appeal this dismissal.

Instead, on August 6, 2008, Del Angel filed the present petition, which he styled as a habeas corpus petition under 28 U.S.C. §2241. He says in this petition that his Section 2255 motion was dismissed without prejudice, which it was not, and that his sentence is unreasonable and not authorized by law.

After review of the pleadings, the Magistrate Judge issued a Report on October 15, 2008, recommending that the petition be dismissed. The Magistrate Judge observed that Del Angel could not challenge his conviction or sentence under Section 2241 unless he showed that the remedy under Section 2255 was inadequate or ineffective to test the legality of the detention, which he failed to

do. Instead, the Magistrate Judge said, Del Angel's petition is properly construed as arising under Section 2255, and as such, it is subject to dismissal as successive, inasmuch as Del Angel failed to show that he had sought or received permission from the Fifth Circuit Court of Appeals to file a successive petition, as required by Section 2255.

A copy of the Magistrate Judge's Report was sent to Del Angel at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has reviewed the pleadings in this cause as well as the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled application for the writ of habeas corpus be and hereby is DISMISSED without prejudice, with refiling conditioned upon the receipt of permission from the Fifth Circuit Court of Appeals to file a successive petition. It is further

ORDERED that the Petitioner Ramiro Del Angel is hereby denied a certificate of appealability *sua sponte*. The denial of this certificate of appealability refers only to an appeal of the present case and shall not affect Del Angel's right to seek permission from the Fifth Circuit Court of Appeals to file a successive petition, nor his right to pursue his claims in the district court in the event that such permission is obtained. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 25th day of November, 2008.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS", is written over a horizontal line.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**